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Paper No. 8

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OFFICE OF PETITIONS

In re Application of	:	
Mohit, et al.	:	
Application No. 09/881,353	:	ON PETITION
Filed: June 12, 2001	:	
Attorney Docket No. BIZ/01-0003	:	

This is a decision on the "Petition to Reinstate Abandoned Application", filed February 2, 2004 (Certificate of Mailing dated January 29, 2004), which is being treated as an alternative petition to withdraw the holding of abandonment under 37 CFR 1.181, petition to revive under 37 CFR 1.137(a), and petition to revive under 37 CFR 1.137(b).

The petition under 37 CFR 1.137(a) is **DISMISSED**.

The petition under 37 CFR 1.181 is **DISMISSED**.

The petition under 37 CFR 1.137(b) is **GRANTED**.

The above-identified application was held abandoned for failure to timely file substitute drawings in response to the Notice to File Missing Parts of Nonprovisional Application mailed August 24, 2001. This Notice set a shortened statutory period for reply of two months. No drawings having been received, the above identified application became abandoned on October 25, 2001. A Notice of Abandonment was mailed on December 17, 2003.

Petition Under 37 CFR 1.181:

A review of the official file reveals that no drawings were filed, since no such drawings are present in the file. An applicant alleging that a paper was filed in the PTO and later misplaced has the burden of proving the allegation by a preponderance of the evidence. Petitioner has supplied no

evidence in the form of an itemized, USPTO date stamped postcard receipt or a transmittal form itemizing drawings in accordance with 37 CFR 1.8. In fact, the transmittal form filed March 4, 2002 (Certificate of Mailing dated February 21, 2002) specifically does **not** itemize drawings.

Petition under 37 CFR 1.137(a):

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.¹

Moreover, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable."²

A prudent and careful man in relation to his most important business would have included a postcard receipt in accordance with MPEP 503 to later establish that drawings had been filed.

The petition fees of \$55 has been charged to Deposit Account No. 50-1001, as authorized.

Petition Under 37 CFR 1.137(b):

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply, unless previously filed; (2) the

¹ In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963); aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² Haines v. Quiqq, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(d).

With the instant petition, applicant paid the petition fee, submitted the required reply in the form of drawings, and made a statement of unintentional delay. 37 CFR 1.137(b)(3) requires a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The statement contained in the instant petition varies from the language required by 37 CFR 1.137(b)(3). The statement contained in the instant petition is being construed as the statement required by 37 CFR 1.137(b)(3). Petitioner must notify the Office if this is **not** a correct interpretation of the statement contained in the instant petition.

The petition fee of \$665 has been charged to Deposit Account No. 50-1001, as authorized.

The application is being forwarded to the Office of Initial Patent Examination for pre-examination processing, using the drawings filed on March 4, 2002 (resupplied on petition filed February 2, 2004).

Telephone inquiries related to this decision should be directed to the undersigned at (703) 305-0272.



Cliff Congo
Petitions Attorney
Office of Petitions